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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/658,736	09/09/2003	Alan Shluzas	1291.1138101	3377
33469 7590 10/05/2010 CROMPTON, SEAGER & TUFTE, LLC 1221 NICOLLET AVENUE SUITE 800 MINNEAPOLIS, MN 55403-2420				
EXAMINER WOODALL, NICHOLAS W				
ART UNIT		PAPER NUMBER		
3775				
MAIL DATE		DELIVERY MODE		
10/05/2010		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/658,736

Applicant(s)

SHLUZAS ET AL.

Examiner

Nicholas Woodall

Art Unit

3775

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 20 September 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: _____.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
 13. ☐ Other: _____.

/Thomas C. Barrett/
Supervisory Patent Examiner, Art Unit 3775

/Nicholas Woodall/
Examiner, Art Unit 3775

Continuation of 11, does NOT place the application in condition for allowance because: The applicant's arguments directed to the claims are not persuasive. First, the examiner would like to note that the applicant's arguments are based on a piecemeal analysis of the references, and one cannot show non-obviousness when the rejection is based on a combination of references. The applicant's argument that one of ordinary skill would not modify the method of Puno to perform the fixation procedure through the cannula of Davison is not persuasive. First, Davison as well as many other references in the art at the time of the invention teach performing known surgical procedures, such as decompression (see Foley U.S. 5,792,044) and fusion (see Foley U.S. 6,575,899 cited on applicants IDS filed 03/02/2007), in order to limit the amount of trauma experienced by the patient to decrease the amount of recovery time. These references clearly show that there were strong design incentives and market forces in the art to adapt the known surgical procedures to minimally invasive procedures in order to reduce the trauma and recovery time of the patient (It is noted that the rationale to modify or combine the prior art does not have to be expressly stated in the prior art; the rationale to modify may be explicitly or implicitly contained in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the art, established scientific principles, or legal precedent established by prior case law). The applicant's argument that modifying the method of Puno to perform the surgical procedure through the cannula of Davison would not have provided predictable results is not persuasive. Many references in the art at the time of the invention teach that minimally invasive procedures reduce the trauma and the recovery time of patients (for example see Foley 5,792,044). Furthermore, Foley reference 6,575,899 teaches performing a fusion procedure through a cannula in a minimally invasive manner in order to reduce trauma and recovery time for the patient (column 1 lines 60-67). The applicant's argument that the Puno reference is directed to an open spinal fusion procedure and cannot be modified by the teaching of Davison, which is directed to the use of only surgical instruments in a minimally invasive procedure is not persuasive. Davison broadly states that the invention is directed to a method for performing a surgical procedure on a body and a cannula for receiving surgical instruments during the surgical procedure. There is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. The references are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures. In *re* Bozek, 163 USPQ 545 (CCPA) 1969. In this case, the Davison reference teaches that minimally invasive procedures reduce trauma and recovery time to the patient, and one having ordinary skill in the art would have found it obvious to perform an open procedure, such as the procedure disclosed by Puno, through a cannula in a minimally invasive procedure in order to reduce the trauma and the recovery time of the patient.